STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER SEIBA,

Defendant-Appellant.

UNPUBLISHED
April 29, 2010

No. 286104
Wayne Circuit Court
LC No. 07-014314-FH

Before: SAWYER, P.J., AND SAAD AND SHAPIRO, JJ.

SHAPIRO, J., (*dissenting*).

I respectfully dissent. Based on my review of the record, I conclude that defendant did not receive effective assistance of counsel, that the trial court improperly refused to give a "missing witness" jury instruction, and that sufficient new exculpatory evidence arose after the trial to justify a new trial. In my view, any one of these and certainly all combined require that a new trial be granted. Accordingly, I would reverse defendant's convictions and remand for a new trial.

At the time of the alleged offense, defendant was 32 years old and according to the record had no history of criminal convictions or charges. According to the complainant, Sarmad Sako, the following occurred. He and defendant had argued on the telephone on the day prior to and the morning of the incident. While Sako was walking down the street, defendant grabbed him, put a gun to his chest, and threatened to kill him. Defendant then punched Sako on the mouth and Sako responded by striking defendant on the face. Defendant swung the gun against the left side of Sako's head, at which time the gun discharged by Sako's ear. Sako was "trying to hit [defendant] again" and defendant struck Sako with the gun a second time, the gun again discharged, this time grazing the right side of Sako's neck. Sako began to chase defendant, telling him to drop the gun. Defendant's friend distracted Sako long enough to permit defendant to get into his car. The friend then pulled a knife on Sako and defendant drove his car into Sako, hitting him in the legs, forcing him up onto the hood of the car, into the windshield and into the air before hitting the ground. The prosecution admitted photographs showing injuries to Sako's mouth, neck and hands.

Sako further testified that after defendant and his friend drove away, Sako called a friend to come take him to the police department and then the hospital. According to Sako, he and his friend went to the twelfth precinct, but were informed they were in the wrong precinct, so they left, but Sako elected to go to the hospital before going to the eleventh precinct. Sako was seen

in the emergency room of St. John's hospital, where it was determined that he had no broken bones or serious injuries. Sako left the emergency room against medical advice.

A police officer who interviewed Sako the day after the incident testified that he was unaware of any physical evidence supporting the allegation that Sako was struck by a motor vehicle and that Sako gave him the name of one witness, a Steven Markus. Markus was endorsed on the prosecution's witness list.

I. Newly Discovered Evidence

"The discovery that testimony introduced at trial was perjured may be grounds for a new trial." *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994).

At the *Ginther*[1] hearing, the brother of defendant's fiancée testified that he encountered a mutual friend of Sako's who indicated that defendant's family "should have just paid" Sako because then Sako "would have just dropped everything, came to the court and admitted that he lied to everything." The witness further testified that the friend then telephoned Sako, put the call on speakerphone, and informed Sako that the witness was also listening. The witness then heard Sako state that if defendant's family paid him $20,000, he would "go to the court and admit that I lied about everything." He also heard Sako state that he had paid Markus $2,000 to falsely tell the police that he had seen the incident. The majority agrees that this is newly discovered evidence, but concludes that the trial court properly evaluated the evidence and determined that Sake never said he lied, but just that he would change his testimony for $20,000. I respectfully disagree.

The trial court stated: "He did not say he lied. He just said he would change his testimony if given $20,000." This is an inaccurate representation of the testimony. The testimony was that Sako stated, "I'll go to the court and admit that I lied about everything." Contrary to the trial court's assessment, this is not simply an offer to change testimony. The testimony was not that Sako would "say" that he lied, but that he would "admit" that he lied. In my opinion, this was a tacit admission of perjury, which entitled defendant to a new trial. Therefore, I disagree with both the trial court's assessment of what the testimony means and the majority's acceptance of that assessment.

Furthermore, there is record evidence that Sako lied on the stand during trial. Specifically, he continually testified that "nothing like this" had ever happened to him before and, when explicitly asked if he had ever been assaulted or shot before, he stated "no." However, the medical records that were introduced indicated that the complainant had a previous gun shot wound in his abdomen from 1995. When the testimony regarding Sako's offer to "admit that [he] lied" and his admission that he paid someone to make a police report confirming his version of the attack is viewed in conjunction with the record evidence that Sako lied on the stand during trial, I believe that the new evidence would make a different result probable on retrial. *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003).

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1993).

Sako was the only witness, and his testimony was not impressive. Thus, this is not a case where the other evidence was so overwhelming that testimony that Sako offered to "admit [he] lied about everything" in exchange for $20,000 or that he paid a witness to make a false report, would not make a difference to the jury. I believe defendant should receive a new trial based on the newly discovered evidence.

II. Missing Witness

I also respectfully disagree with the majority regarding the issues related to the missing witness, Steven Markus.[2]

> A prosecutor who endorses a witness under MCL 767.40a(3) is obligated to exercise due diligence to produce that witness at trial. A prosecutor who fails to produce an endorsed witness may show that the witness could not be produced despite the exercise of due diligence. If the trial court finds a lack of due diligence, the jury should be instructed that it may infer that the missing witness's testimony would have been unfavorable to the prosecution's case. [*People v Eccles*, 260 Mich App 379, 388-389; 677 NW2d 76 (2004) (citations omitted).]

This Court reviews the trial court's determination of due diligence as well as its decision whether to give a missing witness instruction are viewed for an abuse of discretion. *Id.* at 389.

In this case, Sergeant Michael Boyle testified that Marcus was subpoenaed to testify and that Boyle went out to look for him, but was unable to find him. He "drove by [Marcus's] house on Hershey and was unable to contact him" and the home "[a]ppeared to be vacant." Boyle had no other information as to where Marcus could be located. Based on this testimony, defendant requested CJI2d 5.12, arguing that Boyle's single attempt to serve a subpoena was not due diligence. The trial court stated, "It's my understanding that he made reasonabl[e] efforts to try to produce Mr. Marcos for this trial" and declined to give the instruction. The prosecution then made a statement on the record, without any evidentiary support, that he "had my investigator from the prosecutor's office go out and look for Mr. Marcos and they could not find him." The trial court then stated that it believed "that the prosecuting attorney's office did exercise due diligence in attempting to produce Mr. Marcos."

Although the standard of review on a finding of due diligence is fairly deferential, I conclude that the trial court abused its discretion in concluding that due diligence was utilized. The evidence before the trial court, at the time it initially denied the request for the missing witness instruction, was that a single officer had driven by a home on a single occasion and found that it appeared vacant. This is insufficient. Furthermore, the prosecution's supplemental statement lacked any evidentiary support. Nevertheless, even assuming the trial court could base its finding of due diligence on that representation, I find it entirely lacking in detail that the trial court could have possibly made a reasonable determination that due diligence occurred. There is

[2] I have utilized the parties' spelling of the witness's last name. However, the trial transcripts refer to him as "Marcos." All references to Marcus and Marcos in this opinion are to the same individual.

no evidence of what steps the investigator took to locate Marcus. Compared with other efforts that this Court has found constitute due diligence, see, *e.g.*, *Eccles*, 260 Mich App at 389-390 (Finding due diligence where the subpoena was served "numerous times," checked jails and interviewed individuals at the witness's mother's home and the witness's child's mother); *People v Snider*, 239 Mich App 393, 405-406, 422-423; 608 NW2d 502 (2000) (Finding due diligence where the prosecution performed background checks in Indiana, Wisconsin and Michigan and was unable to determine the witness's social security number or if he had a driver's license, has contacted the witness's ex-wife and the witness's brother who both indicated that they did not know where to locate the witness), the steps taken to locate Marcus in this case fall far short of anything resembling due diligence.

Having concluded that the trial court erred in determining that due diligence occurred, it follows that the trial court erred in failing to give CJI2d 5.12. Had the jury been instructed that it could infer that Marcus' testimony would have been adverse to the prosecution, I conclude that there is a reasonable probability that the outcome of the case would have been different, thereby entitling defendant to a new trial.[3]

Additionally, I disagree with the majority's conclusion that the officer's testimony regarding why a witness might refuse to cooperate with the police was permissible. Boyle was permitted to testify, over objection, regarding various speculative reasons that a witness would not come forward, including fear of retaliation, not wanting to be bothered, concern of being labeled a snitch and being injured or killed or having his family injured or killed. Then, immediately after eliciting this testimony regarding people not wanting to come forward for fear of being labeled a snitch, the prosecution questioned Boyle about Marcus providing a statement and Boyle not being able to locate Marcus to testify for trial. The implicit suggestion, as argued by defense counsel, but overruled by the trial court, was that the jury would believe that defendant may have had something to do with why Marcus refused to testify. Thus, not only was defendant not given the appropriate instruction that the jury could infer Marcus's testimony would have been adverse to the prosecution, but the prosecution then elicited testimony that essentially provided the exact opposite inference, so that the jury likely inferred that Marcus's testimony would have been adverse to defendant. This was reversible error.

III. Ineffective Assistance of Counsel

Additionally, I conclude that defendant is entitled to a new trial on the basis of ineffective assistance of counsel. Specifically, I conclude that trial counsel rendered ineffective assistance of counsel by failing to either recommend that defendant testify or allow defendant testify in support of his self-defense claim and failing to call character witnesses to testify as to defendant's peaceful and non-violent character.

[3] I find this particularly true when viewed in conjunction with the *Ginther* testimony that Marcus was paid $2,000 to file the false police report.

A. Self-Defense

At the *Ginther* hearing, defendant testified that Sako attacked him due to a grudge and that he had text and phone messages of Sako threatening him. Based on defendant's recitation of events, it is clear that he had a credible self-defense claim. He further testified at the *Ginther* hearing that he wanted to testify at trial and explain what the actual events of the assault were, but that defense counsel directed him not to testify, telling defendant that he had the case under control and would get an acquittal based on his cross-examination of Sako. Instead of presenting defendant's self-defense argument, defense counsel elected to argue that there was no evidence that the assault ever took place *even though there were photographs of the complainant's injuries*. Without arguing self-defense, or even that Sako clearly got beaten up but not by defendant, the jury was left with nothing to explain the complainant's injuries except that defendant was guilty.

Defense counsel testified that he advised defendant not to testify. Defendant and his girlfriend both agreed that defendant chose to accept counsel's advice, but defendant claims that defense counsel never advised him that the ultimate decision whether to testify was his, and that he would have testified had he known this. "An attorney undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy." *Florida v Nixon*, 543 US 175, 187; 125 S Ct 551; 160 L Ed 2d 565 (2004). Based on the record, I conclude that trial counsel failed to adequately inform defendant that, without his testimony, there could be no defense of self-defense. Thus, although the trial court found that defense counsel made a recommendation to defendant and that defendant accepted this recommendation, I would conclude that where a defendant clearly intends to assert a defense of self-defense and the only way to do so is for him to testify, a defendant's acceptance of advice not to testify cannot be deemed a knowledgeable waiver of that right without some indication that defendant was aware that his defense would be difficult or non-existent without it. Because the record indicates that defendant was not so informed, and the nature of the facts in this case made it such that without self-defense, the jury was left with *no* explanation for Sako's documented injuries, I conclude that this was not a question of trial strategy, but an abdication of the defense. Had the jury been provided *some* explanation for Sako's injuries, it is more the reasonably probable that the result of the proceeding would have been different. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Accordingly, I conclude that defendant was denied effective assistance of counsel and is, therefore, entitled to a new trial.

B. Character Witnesses

At the *Ginther* hearing, defendant's cousin and defendant's employer both testified that defendant had a reputation for being a good person and a hard worker. Additionally, each of them provided an affidavit stating, among other things, that defendant "has an excellent reputation for being a peaceful person," that in their opinion, defendant "is a peaceful person," and that they were able and willing to testify had they been asked. The trial court focused solely on the testimony and never discussed the affidavits. Because the affidavits speak directly to defendant's character for peacefulness, the trial court clearly erred in concluding to the contrary. Thus, I conclude that defendant established support for his claim that the witnesses were competent character witnesses with respect to his alleged reputation for peacefulness and non-violence and, therefore, that counsel was ineffective for not calling these witnesses at trial.

IV. Cumulative Error

Finally, notwithstanding my conclusion that several of these errors by themselves should result in reversal, the cumulative effect of these multiple errors resulted in defendant being deprived of a fair trial.

"The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not warrant reversal." *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001). Reversal on the basis of cumulative error requires the errors to "be of consequence." *Id.* at 388. "Thus, actual errors must combine to cause substantial prejudice to the aggrieved party so that failing to reverse would deny the party substantial justice." *Lewis v LeGrow*, 258 Mich App 175, 201; 670 NW2d 675 (2003). In this case, the combined effect of the errors amounted to substantial prejudice that denied defendant his right to a fair trial, particularly given the lack of any evidence other than Sako's testimony. Accordingly, I would vacate defendant's convictions and grant him a new trial.

/s/ Douglas B. Shapiro